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No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
COURTNEY A. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MARY CATHERINE BONNER*
WANDA RAIFORD
MARY CATHERINE BONNER, PA
207 S.W. 12th Court
Ft. Lauderdale, Florida 33315
(954) 523-6225

Counsel for Petitioner

* Counsel of Record

June 26, 2006

QUESTIONS PRESENTED

I. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment of claim is pending . . . ." Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant have an application pending which tolls the 2244(d)(2) statute of limitations?

II. Alternatively, does the confusion around the statute of limitations – as evidenced by the split in the circuits – constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari?

III. And in the second alternative, do the special circumstances where counsel advising the defendant as to the statute of limitations was registry counsel – a species of state actor – under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Trial Proceedings	2
B. Direct Appeal	4
C. Delay In Appointing Post-Conviction Counsel	5
D. Post-Conviction Proceedings	9
E. Mr. Lawrence's Petition For Writ Of Habeas Corpus	11
F. Eleventh Circuit Opinion	13
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. AN APPLICATION FOR STATE POST-CONVICTION RELIEF REMAINS "PENDING" WITHIN THE MEANING OF § 2244(d)(2) DURING THE 90-DAY PERIOD IN WHICH A PETITION FOR REVIEW OF THE STATE COURT DISPOSITION OF THAT APPLICATION CAN PROPERLY BE FILED IN THIS COURT AND FOR THE DURATION OF CERTIORARI REVIEW	16

TABLE OF CONTENTS – continued

Page

A. The Plain Language Of § 2244(d)(2) Requires For Tolling While An Application For State Post-Conviction Review Is Pending On Certiorari 16

B. Tolling The Statute Of Limitations Under § 2244(d)(2) Pending Certiorari Review Is Consistent With AEDPA's Statutory Scheme 19

C. Tolling Preserves This Court's Institutional Role In Reviewing State Post-Conviction Proceedings 23

D. Tolling The Statute Of Limitations Under § 2244(d)(2) Pending Certiorari Review Avoids Absurd And Inequitable Results 26

II. EQUITABLE TOLLING IS WARRANTED 30

A. The Facts Of Mr. Lawrence's Case Meet The Established Standards For Equitable Tolling 31

B. Florida's Acknowledged Systemic Failures Impeded The Timely Filing Of Mr. Lawrence's Federal Habeas Petition 33

C. Mr. Lawrence's Reasonable Reliance On His State-Appointed And Monitored Counsel Prevented Him From Filing A Timely Federal Habeas Petition 36

CONCLUSION 42

TABLE OF AUTHORITIES

CASES Page

Abela v. *Martin*, 348 F.3d 164 (6th Cir. 2003), *cert. denied sub nom. Caruso* v. *Abela*, 541 U.S. 1070 (2004) 13, 14, 41
Arbelaez v. State, 898 So.2d 25 (Fla. 2005) 10
Alvarez-Machain v. *United States*, 107 F.3d 696 (9th Cir. 1996) 31
Bates v. *United States*, 522 U.S. 23 (1997) 22
Beard v. *Banks*, 542 U.S. 406 (2004) 24
Bell v. *Fowler*, 99 F.3d 262 (8th Cir. 1996) 32
Bilbrey v. *Douglas*, 124 Fed. Appx. 971 (6th Cir.), *cert denied*, 126 S. Ct. 437 (2005) 41
Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) 40
Browning v. *AT&T Paradyne*, 120 F.3d 222 (11th Cir. 1997) 31, 32
Bunkley v. *Florida*, 538 U.S. 835 (2003) 26
Calderon v. *United States Dist. Court*, 163 F.3d 530 (9th Cir. 1998), *abrogated on other grounds by Woodford* v. *Garceau*, 538 U.S. 202 (2003) 40
Cantrell v. *Knoxville Cmty. Dev. Corp*, 60 F.3d 1177 (6th Cir. 1995) 39
Carey v. *Saffold*, 536 U.S. 214 (2002) 14, 17, 18
Clay v. *United States*, 537 U.S. 522 (2003) 4, 19, 23
Coates v. *Byrd*, 211 F.3d 1225 (11th Cir. 2000) 11, 17, 27, 41
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 24
Coleman v. *Davis*, 175 F. Supp. 2d 1109 (N.D. Ind. 2001) 27
Crawley v. *Catoe*, 257 F.3d 395 (4th Cir. 2001) ... 19, 27
Curtiss v. *Mount Pleasant Corr. Facility*, 338 F.3d 851 (8th Cir. 2003) 28

TABLE OF AUTHORITIES – continued

Page

Day v. *McDonough*, 126 S. Ct. 1675 (2006) 33, 39
Duncan v. *Walker*, 533 U.S. 167 (2001) 17, 22, 28
Durden v. *California*, 531 U.S. 1184 (2001) 24
Durham v. *United States*, 401 U.S. 481 (1971), *overruled on other grounds by Dove* v. *United States*, 423 U.S. 325 (1976) 23
Fay v. *Noia*, 372 U.S. 391 (1963), *abrogated on other grounds by Coleman* v. *Thompson*, 501 U.S. 722 (1991) 24
Florida v. *Nixon*, 543 U.S. 175 (2004) 29
Gardner v. *Florida*, 430 U.S. 349 (1977) 32
Glus v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) 33
Graffam v. *Burgess*, 117 U.S. 180 (1886) 40
Harris v. *Hutchinson*, 209 F.3d 325 (4th Cir. 2000) 32
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 30, 32, 39, 41
Isham v. *Randle*, 226 F.3d 691 (6th Cir. 2000), *overruled en banc by Abela* v. *Martin*, 348 F.3d 164 (6th Cir. 2003) 27
Kapral v. *United States*, 166 F.3d 565 (3d Cir. 1999) 20, 21
Lawrence v. *Florida*, 522 U.S. 1080 (1998) 4
Lawrence v. *State*, 698 So. 2d 1219 (Fla. 1997) ... 2, 3, 4
Lawrence v. *State*, 831 So. 2d 121 (Fla. 2002) 11
Lehman v. *United States*, 154 F.3d 1010 (9th Cir. 1998) 32
McNeal v. *Culver*, 365 U.S. 109 (1961) 25
Miller v. *Dragovich*, 311 F.3d 574 (3d Cir. 2002) 27
Murdock v. *City of Memphis*, 87 U.S. 590 (1874) 17

TABLE OF AUTHORITIES – continued

	Page
Murray v. *Giarratano*, 492 U.S. 1 (1989)	39
Nyland v. *Moore*, 216 F.3d 1264 (11th Cir. 2000)	19
Ott v. *Johnson*, 192 F.3d 510 (5th Cir. 1999)	27
Ozmint v. *Nance*, 543 U.S. 1043 (2005)	26
Pace v. *DiGuglielmo*, 544 U.S. 408 (2005)	38
Painter v. *Iowa*, 247 F.3d 1255 (8th Cir. 2001)	28
Pennsylvania v. *Finley*, 481 U.S. 551 (1987)	29
Rhine v. *Boone*, 182 F.3d 1153 (10th Cir. 1999)	17, 27
Rhines v. *Weber*, 544 U.S. 269 (2005)	38, 39
Ring v. *Arizona*, 536 U.S. 584 (2002)	32
Rouse v. *Lee*, 339 F.3d 238 (4th Cir. 2003), *cert denied*, 541 U.S. 905 (2004)	39
Slack v. *McDaniel*, 529 U.S. 473 (2000)	33
Serrano v. *Williams*, 383 F.3d 1181 (10th Cir. 2004)	19
Smith v. *Texas*, 543 U.S. 37 (2004)	25
Snow v. *Ault*, 238 F.3d 1033 (8th Cir. 2001)	27
Steed v. *Head*, 219 F.3d 1287 (11th Cir. 2000)	27
Stokes v. *District Attorney*, 247 F.3d 539 (3d Cir. 2001)	27
Teague v. *Lane*, 489 U.S. 288 (1989)	24
Thompson v. *State*, 648 So.2d 692 (Fla. 1994)	10
United States v. *Turkette*, 452 U.S. 576 (1981)	26
White v. *Klitzkie*, 281 F.3d 920 (9th Cir. 2002)	27
Wilde v. *Wyoming*, 362 U.S. 607 (1960)	25
Williams v. *Taylor*, 529 U.S. 362 (2000)	25
Williams v. *Taylor*, 529 U.S. 420 (2000)	38
Wolin v. *Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996), *abrogated on other grounds by Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997)	32
Wood v. *Carpenter*, 101 U.S. 135 (1879)	40
Woodson v. *North Carolina*, 428 U.S. 280 (1976)	32

TABLE OF AUTHORITIES – continued

STATUTES — Page

28 U.S.C. § 1257(a) 24
§ 2104 20
§ 2106 ..... 20, 26
§ 2244 ..... 1, 4, 19
§ 2254 ..... 11, 25
§ 2261 *et seq* 21
§ 2263 22
Fla. Stat. § 27.11(12) 37
§ 27.704(2) 38
§ 27.710 37

RULES

Fla. R. Crim. P. 3.850 4
3.851 4
3.851 cmt. (1993) 5, 34
Amendments to Florida Rules of Criminal Procedure – Capital Postconviction Public Records Production (Time Tolling), 719 So. 2d 869 (Fla. 1998) 6, 8, 9, 34

LEGISLATIVE HISTORY

S. 3, 104th Cong. (1995) 21
S. 623, 104th Cong. (1995) 21
S. 1328, 15th Leg., 2d Sess. (Fla. 1998) 6
S. 1330, 15th Leg., 2d Sess. (Fla. 1998) 8
141 Cong. Rec. S4592 (daily ed. Mar. 24, 1995) 21

FOREIGN STATUTE

Limitations Act, 1632, 21 Jac. 1, c. 16 (Eng.) 40

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITY Page

Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Post-conviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521 (2005)..... 37

OTHER AUTHORITIES

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)..... 39

Black's Law Dictionary (7th ed. 2003)..... 40

Am. Ass'n on Mental Retardation, *Definition of Mental Retardation*, *available at* http://www.aamr.org/Policies/faq_mental_retardation.html (last updated Mar. 11, 2005)..... 40

Criminal Justice Comm., Senate Staff Analysis and Economic Impact Statement of CS/SB 1328 (Fla. Mar. 3, 1998)..... 34

Fla. Comm'n on Capital Cases, *Inmate Legal Status Report re: Gary Lawrence*, *available at* http://www.floridacapitalcases.state.fl.us..... 4

Letter from Michael Rappaport, Ph.D. to Joe McDermott, Esq. (Sept. 20, 1999)..... 10

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (J.A. __) is reported at 421 F.3d 1221 (11th Cir. 2005).

JURISDICTION

Judgment by the Court of Appeals for the Eleventh Circuit was issued on August 26, 2005. Petitioner timely filed a Petition for a Writ of Certiorari on January 23, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act ("AEDPA") (28 U.S.C. § 2244(d)) provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

At issue in this case are the provisions of the AEDPA that govern the one-year limitations period for filing federal habeas petitions. The Eleventh Circuit refused to toll petitioner's limitations period pending review of a petition for

a writ of certiorari to this Court following state court denial of post-conviction relief and affirmed the Northern District of Florida's dismissal of his claim for federal habeas relief as untimely. The effect of this ruling deprives the petitioner of a federal forum for his constitutional claims. Moreover, this reading of the statute is at odds with its plain language and statutory structure and leads to absurd and inequitable results. Accordingly, this Court should vacate the judgment below and remand for consideration of petitioner's underlying claim for federal habeas corpus relief.

A. Trial Proceedings.

In March 1995, a Florida jury convicted Mr. Lawrence of premeditated murder in the first degree and conspiracy to commit murder.[1] Mr. Lawrence was found guilty, along with his wife, Brenda Lawrence, of brutally beating to death his wife's lover, Michael Finken. *Lawrence* v. *State*, 698 So. 2d 1219, 1220 (Fla. 1997). The prosecutor's evidence showed that during a drinking binge in which all three individuals participated, Mr. Lawrence's wife revealed to him that she had been sexually involved with Mr. Finken.[2] Prosecutors argued that in a state of drunken anger, and with his wife's participation, Mr. Lawrence attacked and killed Mr. Finken. Following the jury's recommendation, the trial court sentenced Mr. Lawrence to death.[3] Notwithstanding evidence that Brenda Lawrence was the moving force behind the attack on the victim, may have obtained the murder weapons, struck

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[1] (J.A. ___) *Lawrence* v. *Florida*, 421 F.3d 1221, 1222 (11th Cir. 2005).

[2] 5 Tr. of R. at 266, *State* v. *Lawrence*, No. 85,725 (Fla. June 20, 1995); 6 Tr. of R. at 340, *State* v. *Lawrence*, No. 85,725 (Fla. June 20, 1995).

[3] (J.A. ___) *Lawrence*, 421 F.3d at 1222.

blows, and celebrated after the killing,[4] she received a life sentence.[5]

Florida has a bifurcated capital procedure with a trial to establish each element of the crimes charged followed by a separate penalty-phase proceeding. At trial in this case, there was extensive testimony about Mr. Lawrence's drunkenness. But the defense did not present a single expert at trial to testify regarding impact of this extreme intoxication on Mr. Lawrence's ability to formulate intent. Nor was evidence produced on the issue of Mr. Lawrence's life-long use of intoxicants and drugs. Also absent was any testimony about Mr. Lawrence's very low IQ. Experts before the jury discussed none of these issues until the sentencing phase of the trial. There, questions of alcohol abuse, mental illness and mental retardation were introduced through the testimony of Drs. James Larson and Glenn Galloway, who explained that Mr. Lawrence's 81 IQ places him near the level of legal incompetence and correlates with an inability to process ideas, to plan, to understand, to appreciate relationships, and to understand what goes on in daily life.[6] Trial counsel, however, did not instruct either expert to investigate or testify regarding the serious potential for organic brain disorders given Mr. Lawrence's history. New counsel for Mr. Lawrence in the state post-conviction process did present such evidence and argued that a failure to investigate such obvious leads rendered trial counsel's assistance ineffective.

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[4] (J.A. ___) 421 F.3d at 1222-23.

[5] *Lawrence*, 698 So. 2d at 1221.

[6] *See* Penalty Phase Tr. at 78-79, *State* v. *Lawrence*, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Mar. 17, 1995) ("Penalty Phase Tr.") (test. of Dr. Glenn Galloway).

B. Direct Appeal.

Mr. Lawrence appealed his conviction and sentence.[7] On August 28, 1997, the Supreme Court of Florida affirmed[8] and his conviction became final on January 20, 1998.[9] On that date, the state's one-year statute of limitations for post-conviction proceedings began to run. Fla. R. Crim. P. 3.851.

Pursuant to 28 U.S.C. § 2244(d)(1)(A), AEDPA's one-year limitations period also began to run on January 20, 1998 at the "conclusion of direct review," including the time for filing a petition for certiorari or the time necessary for such a petition to be resolved. 28 U.S.C. § 2244(d)(1)(A); *Clay* v. *United States*, 537 U.S. 522, 527 (2003). AEDPA's limitations period was thereafter tolled by Mr. Lawrence's filing of a petition for state post-conviction relief pursuant to Fla. R. Crim. P. 3.850. 28 U.S.C. § 2244(d)(2). That motion was not filed until January 19, 1999, 364 days after direct review was finalized, tolling the AEDPA's one-year limitations period with just one day remaining. As explained below, this delay was entirely attributable to extensive changes in Florida's post-conviction appointment and representation process.

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[7] On appeal, Mr. Lawrence raised the following claims: (1) his death sentence was disproportionate to other death penalty cases; (2) the murder was not committed in a cold, calculated, and premeditated manner; (3) the murder was not heinous, atrocious, or cruel; and (4) the trial court erred in failing to find statutory mitigating circumstances and in rejecting the disparate treatment of his co-defendant Brenda Lawrence as a mitigating circumstance. *See Lawrence*, 698 So. 2d at 1221-22.

[8] *See Lawrence*, 698 So. 2d 1219. The court issued a mandate on October 2, 1997. Fla. Comm'n on Capital Cases, *Inmate Legal Status Report re: Gary Lawrence*, *available at* http://www.floridacapitalcases.state.fl.us).

[9] *Lawrence* v. *Florida*, 522 U.S. 1080 (1998).

C. Delay In Appointing Post-Conviction Counsel.

Mr. Lawrence had 365 days from January 20, 1998, the date his state conviction became final, to file for state post-conviction relief and federal habeas relief. He was, of course, required to exhaust state remedies in the form of state post-conviction proceedings before filing a petition for federal habeas corpus. Complying with this requirement took 364 days.

In order to understand why 364 days passed before Mr. Lawrence's state post-conviction application was filed, one must look at the dire circumstances in Florida during the relevant time frame. Florida instituted major reforms of the state's post-conviction review process in capital cases in 1993. This was an attempt to repair a dysfunctional system in which cases languished in post-conviction proceedings for many years and court-appointed attorneys were unable "to properly represent all death penalty inmates in post-conviction relief cases." See Fla. R. Crim. P. 3.851 cmt. (1993). In order to expedite the review process, the statute of limitations for filing for a state post-conviction application was reduced from two years to one year. However, when the Supreme Court of Florida adopted these procedural changes, it specifically noted that reducing the limitations period for seeking collateral relief in capital cases could only be justified if counsel were immediately available to capital defendants.[10] Notwithstanding the Supreme Court of Florida's directive that counsel should be appointed within thirty days, the 1993 rule did not expressly require appointment of counsel within that time frame. As this case exemplifies, the thirty-day

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[10] *See* Fla. R. Crim. P. 3.851 cmt. (1993) (stating that "counsel should be designated . . . not later than 30 days after the defendant's judgment and sentence of death becomes final. . . . In the event the capital collateral representative is not fully funded and available to provide proper representation . . the reduction in the time period would not be justified and would necessarily have to be repealed").

appointment window was not always honored in practice; yet the two-year limitations period was never restored.

These perilous circumstances continued for more than five years, and they were on-going when Mr. Lawrence's capital conviction became final on January 20, 1998. Subsequently, on July 1, 1998 (at which time Mr. Lawrence had been without counsel for over five months and remained so) the state legislature amended Rule 3.851 to require appointment of post-conviction counsel in all capital cases within ninety-one days.[11]

Although Florida law provides that death-penalty defendants will be appointed post-conviction counsel and that such counsel will be appointed promptly, this did not happen here. Mr. Lawrence was not appointed counsel within the Supreme Court of Florida's strongly suggested thirty-day time-frame, or even within the Florida legislature's mandated ninety-one day time-frame. Instead, Florida first appointed counsel for Mr. Lawrence on August 10, 1998, 202 days after the state and AEDPA limitations periods began to run.[12]

Each day that the Florida system delayed this appointment deprived Mr. Lawrence of a day available to meet two 365-day filing deadlines, one for state post-conviction relief and the other for a federal habeas petition. Yet this initial appointment of counsel did not cure the State's long delay, as Mr. Lawrence's first attorney promptly petitioned the court to withdraw because of a conflict and was permitted to withdraw

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[11] *See* S. 1328, 15th Leg., 2d Sess. (Fla. 1998); *see also Amendments to Florida Rules of Criminal Procedure - Capital Postconviction Public Records Production (Time Tolling)*, 719 So. 2d 869, 870 (Fla. 1998) ("private counsel is to be appointed by the trial court in any capital case in which ninety-one days have elapsed since this Court issued its mandate or, where a petition for certiorari was filed with the United States Supreme Court, ninety-one days have elapsed since the petition was denied").

[12] *See* Order Appointing Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Aug. 10, 1998)).

on August 31, 1998.[13] At that point, there were 142 days left of the original 365.

The court appointed a second post-conviction attorney for Mr. Lawrence.[14] The court, the State, and the second attorney spent sixty-six days, from August 31, 1998 to November 5, 1998 discussing the suitability of the appointment contract, the burden of the attorney's caseload, and other matters unrelated to the issues in this case. After two months of these discussions, the court entered an order allowing that attorney to withdraw.[15] There were sixty-seven days left of the 365-day limitations period.

It was not until November 5, 1998, a full 298 days after his certiorari petition was denied, that Mr. Lawrence was appointed counsel who took an active role in his case.[16] At this point, counsel had only two months left in which to assemble and become familiar with the record, conduct further investigation, research legal questions, and file an initial application for state post-conviction review in order to toll the clock that was running against Mr. Lawrence's federal habeas motion.

After counsel was appointed on November 5, he promptly requested the record below. The Florida records custodian provided post-conviction counsel with those records on December 14, with only thirty-seven days left of the original

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[13] *See* Pet. to Withdraw as Appointed Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. filed Aug. 31, 1998).

[14] *See* Order Appointing Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Aug. 31, 1998).

[15] *See* Order Allowing Attorney to Withdraw, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Nov. 5, 1998).

[16] *See* Amended Order Appointing Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Nov. 5, 1998).

365.[17] Counsel then asked and was allowed to hire an investigator on December 17.[18] There were thirty-three days left. Assessing the need for additional records, counsel filed a supplemental records request. On January 4, 1999, counsel filed an unsuccessful motion for an extension of time and tolling of the clock while he waited for state agencies to produce or contest the production of supplemental records not provided on December 14, 1998.[19] There were sixteen days left. While records production litigation was still on-going, counsel filed the state post-conviction motion on January 19, 1999. Mr. Lawrence had only one day left on the clock to file his federal habeas petition.[20]

In the midst of these delays, the Florida legislature substantially altered the discovery process in post-conviction proceedings. See *Amendments to Florida Rules of Criminal Procedure - Capital Postconviction Public Records Production (Time Tolling)*, 719 So. 2d 869, 870 (Fla. 1998). The legislature directed that the Secretary of State establish a repository for archiving capital post-conviction public records in order to better facilitate the timely exchange of documents. *See* S. 1330, 15th Leg., 2d Sess. (Fla. 1998). The new discovery system was to be fully implemented by October 1, 1998. As might be expected, however, the transition created considerable turmoil and resulted in significant delays in the

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[17] *See* Mot. to Extend Time for 3.852 Disclosure of Additional Public Records, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. filed Jan. 4, 1999).

[18] *See* Order on Defense Motion for Appointment of Investigator, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Dec. 17, 1998).

[19] *See* Mot. to Extend Time for 3.852 Disclosure of Additional Public Records, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. filed Jan. 4, 1999).

[20] *See* Case Information/Progress Docket, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct.).

post-conviction review process. *Amendments to Florida Rules of Criminal Procedure*, 719 So. 2d at 870-71.

On June 25, 1998, the Supreme Court of Florida issued an opinion acknowledging the chaos in the post-conviction review process and recognizing that the upheaval would have a detrimental impact on Mr. Lawrence's case and that of dozens of other capital defendants. *Id.* The Supreme Court took the extraordinary step of continuing an earlier, temporary tolling order and tolling the statute of limitations for state habeas petitions to October 1, 1998. See *id.* app. B (tolling the state time requirements for all defendants, including Mr. Lawrence, for whom public records had been compiled in the new repositories but for whom counsel had not been provided). The court further ordered appointment of counsel for Mr. Lawrence and others from either the office of Capital Collateral Relief Counsel or the state-established registry of private counsel by October 1, 1998. *Id.* at 871.

Mr. Lawrence did finally receive counsel who took an active role in his case on November 5, 1998. Yet while the state statute of limitations had been tolled for 130 days by the Supreme Court of Florida, that court had no authority to apply the equitable principles that had prompted its tolling of the state statute of limitations to the AEDPA limitations period. Thus, incongruously, the federal statute of limitations continued to run until counsel was finally able to file a 3.850 motion for state post-conviction relief on January 19, 1999 with only one day remaining on Mr. Lawrence's AEDPA clock.

D. Post-Conviction Proceedings.

Mr. Lawrence's motion for post-conviction relief under Fla. R. Crim. P. 3.850 focused on claims that his trial counsel had rendered ineffective assistance. Specifically, Mr. Lawrence contended that trial counsel had failed adequately to investigate mitigating evidence relating to Mr. Lawrence's significant mental impairment, which bordered on mental

retardation and may have been related to fetal alcohol syndrome.[21] Experts who evaluated Mr. Lawrence indicated that his IQ score of 81 and other indicia of severely diminished capacity might have in fact been clinical retardation[22] and therefore a powerful mitigating factor, if not one that constitutionally precluded imposition of the death penalty.[23]

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[21] The application for state post-conviction relief also raised the following issues: (1) lack of sentencing proportionality between codefendants; (2) the improper consideration of evidence in aggravation concerning Mr. Lawrence's previous sentence of imprisonment; (3) the State's noncompliance with public requests for public records; and (4) the State's noncompliance with requests for judicial records. *See* Mot. for Post-Conviction Relief 3.850, *State* v. *Lawrence*, No. 94-397-CF (Santa Rosa County, Fla. Cir. Ct. Jan. 19, 1999). On April 22, 1999, Mr. Lawrence filed an amended motion for post-conviction relief, asserting fourteen claims of ineffective assistance of counsel. Among the ineffective assistance claims, Mr. Lawrence alleged: inadequate presentation of Mr. Lawrence's mental deficiencies and use of intoxicants; failure to object to the State's comments during closing argument that evidence was uncontroverted; no assistance by an additional defense attorney. *See* Am. Mot. for Post-Conviction Relief 3.850, No. 94-397-CF (Santa Rosa County, Fla. Cir. Ct. Apr. 22, 1999); *see also* Letter from Michael Rappaport, Ph.D. to Joe McDermott, Esq. 1-2 (Sept. 20, 1999) (psychological evaluation of Gary Lawrence) (on file with counsel of record) ("It is hard to imagine that his mother was not drinking when she was pregnant with him because of the significant alcohol abuse in the house.").

[22] *See, i.e.*, Penalty Phase Tr. at 78-79 (test. of Dr. Glenn Galloway).

[23] *See Thompson* v. *State*, 648 So. 2d 692, 697 (Fla. 1994) (noting that the Florida Supreme Court has an established practice of following "the approach suggested by the United States Supreme Court" and treating low intelligence as a significant mitigating factor in capital cases); *Arbelaez* v. *State*, 898 So. 2d 25,34 (Fla. 2005) (finding deficient performance of trial court counsel in a death penalty case for failing to investigate defendant's low intelligence because "we have . . . elected to . . . treat low intelligence as a significant mitigating factor" (omissions in original) (citing *Crook* v. *State*, 813 So. 2d 68, 76 (Fla. 2002)).

The trial court denied Mr. Lawrence's petition for state post-conviction relief on October 11, 2000. And on October 17, 2002, the Supreme Court of Florida affirmed. *Lawrence* v. *State*, 831 So. 2d 121 (Fla. 2002). The Supreme Court of Florida issued its mandate on November 18, 2002.[24] Counsel filed a petition for writ of certiorari in this Court on January 9, 2003.

At issue here is whether Mr. Lawrence's petition for certiorari, seeking this Court's review of the state's denial of post-conviction relief, further tolled the AEDPA statute of limitations.

E. Mr. Lawrence's Petition For Writ Of Habeas Corpus.

Mr. Lawrence filed a pro se petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the Northern District of Florida on March 11, 2003.[25] However, Eleventh Circuit case law then (as now) held that his petition for certiorari did not toll the AEDPA limitations period. *Coates* v. *Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000). Under that rule, Mr. Lawrence should have filed his § 2254 habeas petition in federal court 112 days earlier, on November 19, 2002, one day after the Supreme Court of Florida issued its mandate affirming the denial of post-conviction relief. Plainly, Mr. Lawrence's state post-conviction counsel operated under the mistaken belief

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[24] *See* Case Information/Progress Docket, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct.).

[25] The pro se nature of the filing is not explained by the record. The petition is type-written even though Mr. Lawrence had neither access to a typewriter or computer, nor the ability to produce such a document. The nature of the document and the timing of its filing – just thirteen days before this Court denied certiorari on March 24, 2003 – suggests that Mr. Lawrence received the on-going assistance and advice of state post-conviction counsel that was informed both by the belief that he would have only one day left under the AEDPA statute in the event of a denial and attention to the Court's conference docket.

that the timely filed petition for certiorari seeking review of the Supreme Court of Florida's decision tolled AEDPA's limitations period.

The federal district court quickly appointed counsel who filed a supplemental habeas petition. The State responded by urging dismissal on the ground that the petition was time-barred. (J.A. ___) Response To Order To Show Cause By State Of Florida, No. 3:03-Cv-00097-RH (N.D. Fl. filed Jan. 12, 2004). The State further contended that equitable tolling was not warranted. (J.A. ___) *Id.* Mr. Lawrence opposed dismissal on the ground that a disagreement among the circuits existed on the question of whether a petition for certiorari to this Court following the denial of state post-conviction relief tolls the AEDPA limitations period. (J.A. ___) Reply To Response To Motion To Amend/Correct, No. 3:03-Cv-00097-RH (N.D. Fl. filed Mar. 30, 2004)

Mr. Lawrence argued in the alternative that equitable tolling was warranted because: (1) counsel who advised him of the timing of his petition was selected, pre-qualified and monitored by the State of Florida under its registry statute; (2) his own mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim. (J.A. ___) *Id.*

On April 12, 2004, the district court *sua sponte* entered an order staying the proceedings. See (J.A. ___) No. 3:03cv97-RH (N.D. Fl. Apr. 12, 2004). Although it rejected Mr. Lawrence's equitable tolling argument, the district court found that the petition's timeliness "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." (J.A. ___) *Id.* at 1-2. While noting that the Eleventh Circuit's interpretation of § 2254(d)(2) precluded tolling, the district court observed that a petition for review of a contrary holding by the Sixth Circuit was pending before this Court and ordered that the stay

remain effective until that petition was decided. The State's challenge to the stay on interlocutory appeal was dismissed by the Eleventh Circuit.

Following this Court's decision not to review the Sixth Circuit case,[26] the district court dismissed Mr. Lawrence's petition as time-barred. (J.A. ___) No. 3:03cv97-RH, slip op. at 2 (N.D. Fl. May 27, 2004). Mr. Lawrence then sought a Certificate of Appealability ("COA"), which the district court granted. (J.A. ___) No. 3:03cv97-RH, slip op. at 3 (N.D. Fl. Nov. 15, 2004).

F. Eleventh Circuit Opinion.

The Eleventh Circuit affirmed. Relying upon its opinion in *Coates* v. *Byrd*, the Court held that "the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." (J.A. ___) *Lawrence*, 421 F.3d at 1225 (alteration omitted) (quoting *Coates*, 211 F.3d at 1227). The court of appeals mentioned the split in the circuits on the statutory tolling issue only in service of its criticism of the district court both for issuing the stay and for issuing the COA. The Eleventh Circuit opined that in light of the *Coates* precedent, the stay caused "needless delay" and amounted to an abuse of discretion by the district court. (J.A. ___) *Id.* at 1224. Again citing *Coates*, the court noted that "binding circuit precedent clearly disposed of the [statutory tolling] issue." (J.A. ___) *Id.* at 1225.

The Eleventh Circuit made no attempt to consider its decision in *Coates* in light of the contrary decision of the Sixth Circuit en banc in *Abela*, even though *Abela* post-dated *Coates* and criticized the rationale supporting the *Coates*

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[26] *Abela* v. *Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso* v. *Abela*, 541 U.S. 1070 (2004).

decision. The Sixth Circuit observed, for example, that the focus of § 2244(d)(2) is not on the court in which the application for post-conviction relief is pending but rather on the incomplete nature of the application itself as long as further review remains available. *Abela* v. *Martin*, 348 F.3d 164, 170 (6th Cir. 2003) (en banc). Second, the *Abela* court recognized that requiring "a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief." *Id.* at 171. The Eleventh Circuit offered no response in its *Lawrence* opinion. Nor did it elaborate in any way on its cursory analysis in *Coates*.

SUMMARY OF ARGUMENT

Section 2244(d)(2) tolls the one-year statute of limitations imposed by § 2244(d)(1) while a "properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." Read consistently with each other and with this Court's precedent, these provisions plainly indicate that an application for state post-conviction relief remains pending while a certiorari petition challenging its resolution by the state's highest court may properly be filed or awaits disposition by this Court.

This is a capital case. If the Eleventh Circuit's ruling is affirmed, no federal court will review the merits of Gary Lawrence's underlying constitutional claims before he is put to death or the claims of others who are similarly situated. Petitioner's complete exclusion from federal court rests on a reading of the statute that is wholly inconsistent with its plain language and this Court's recent holding in *Carey* v. *Saffold*, 536 U.S. 214 (2002) interpreting that language. The reading, moreover, is at odds with AEDPA's broader statutory structure, which indicates that when Congress intended to exclude certiorari review from a tolling provision under

AEDPA, it knew how to do so with unmistakable clarity. That same interpretation of § 2244(d)(2) will inevitably lead to absurd results when the Court grants certiorari, reviews the underlying application on the merits, and remands to the state courts for further proceedings.

Furthermore, the Eleventh Circuit's rule is likely to lead to irrational and inefficient piecemeal litigation by encouraging state prisoners trying diligently to preserve their federal constitutional claims to file protective habeas corpus petitions. Finally, state prisoners may simply forgo certiorari review in this Court altogether under the pressure of an unyielding deadline, severely diminishing this Court's ability to evaluate federal constitutional claims that arise in the context of state post-conviction proceedings and to define the contours of federal constitutional claims in other procedural contexts.

If the Eleventh Circuit's statutory construction is adopted, the extraordinary circumstances of this case nonetheless warrant equitable tolling of Mr. Lawrence's AEDPA statute of limitations to permit him to litigate his constitutional claims in a federal forum. First, extreme disorganization within Florida's capital defender program during the relevant period caused 298 out of 365 days to elapse before any appointed counsel took action on Mr. Lawrence's behalf. The Supreme Court of Florida recognized the great inequity of requiring state prisoners to comply with a one-year statute of limitations in the face of Florida's bureaucratic failures and tolled the limitations period for filing an application for state post-conviction relief in Mr. Lawrence's case. The AEDPA one-year limitations period runs concurrently with the state limitations period. Yet the Supreme Court of Florida did not have the authority to toll the AEDPA limitations period concurrently with the state statute even though it was equally impossible for Mr. Lawrence to meet the one-year federal limitations period.

Second, in spite of extensive affirmative guarantees on Florida's part that state appointed counsel would be highly qualified and monitored by the state, post-conviction counsel's interpretation of the AEDPA statute of limitations was erroneous under Eleventh Circuit precedent. Compounded with the time wasted through Florida's administrative delays, post-conviction counsel's error caused Mr. Lawrence's federal habeas petition to be untimely. Accordingly, this Court should grant relief permitting litigation of Mr. Lawrence's underlying constitutional claims in federal court.

ARGUMENT

I. AN APPLICATION FOR STATE POST-CONVICTION RELIEF REMAINS "PENDING" WITHIN THE MEANING OF § 2244(d)(2) DURING THE 90-DAY PERIOD IN WHICH A PETITION FOR REVIEW OF THE STATE COURT DISPOSITION OF THAT APPLICATION CAN PROPERLY BE FILED IN THIS COURT AND FOR THE DURATION OF CERTIORARI REVIEW.

A. The Plain Language Of § 2244(d)(2) Requires Tolling While An Application For State Post-Conviction Review Is Pending On Certiorari.

Section 2244(d)(2) provides for tolling of the one-year statute of limitations imposed by § 2244(d)(1) while a "properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." A plain reading of this language, in light of this Court's recent decisions interpreting these statutory provisions, demonstrates that such an application is "pending" while a certiorari petition challenging its resolution by the state's highest court may properly be filed or awaits disposition by this Court. As a threshold matter, the "application" to which § 2244(d)(2) refers can only be the

original petition or motion for post-conviction relief filed in the state trial court. This Court's review, or the time for seeking such review, is an integral final step in the proceedings on the original application for state post-conviction relief.[27]

Nothing in the AEDPA provisions at issue here alters this Court's long established jurisdiction to review the federal constitutional issues raised in state post-conviction proceedings. Moreover, nothing in §2244(d)(2) specifies that a "pending" application is one that is pending only in state court as opposed to this Court.[28] As long as the matter can still be brought before a court that has authority to review the judgment itself, the original application for post-conviction relief has not achieved final resolution. Because the highest state court's judgment denying collateral relief is subject to further certiorari review in this Court, the application must be deemed pending under § 2244(d)(2) while such a petition is being considered or during the period when a petition could properly be filed.

The Court's decision in *Carey* v. *Saffold*, 536 U.S. 214 (2002), construed the very provision at issue here. In *Saffold*

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[27] Although the Supreme Court's review of a state judgment is limited to federal questions, this Court is nonetheless "a court of *appeal* from the State courts." *Murdock* v. *City of Memphis*, 87 U.S. 590 (1874).

[28] Those circuits that have excluded the certiorari process from the tolling operation of § 2244(d)(2) on the ground that a petition for certiorari is not a "state" proceeding have misconstrued this Court's holding in *Duncan* v. *Walker*, 533 U.S. 167 (2001). *See Rhine* v. *Boone*, 182 F.3d 1153, 1154-55 (10th Cir. 1999); *Coates*, 211 F.3d at 1227. In holding that a federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2), the Court simply recognized that a federal habeas petition cannot seek state post-conviction relief and refused to let "unripe" federal habeas petitions toll the AEDPA statute of limitations. *Duncan*, 533 U.S. at 180-81. *Duncan* did not address the very different context of this Court's review of state court dispositions of applications for state post-conviction relief.

the Court firmly rejected California's contention that no application for state collateral relief is "pending" under § 2244(d)(2) between a lower state court's decision on the application and the filing of a notice of appeal to a higher state court as inconsistent with the word's ordinary meaning. *Id* at 219. The Court emphasized that the word "pending" signifies a review process that is "in continuance" or an application that is "not yet decided." *Id.* An application remains pending, the Court elaborated, "until the completion of" the post-conviction review process. In finding that the statute of limitations was tolled between a lower state court's denial of collateral relief and the filing of an appeal, the Court treated the appellate stages of post-conviction review essentially as an extension of the proceedings on the original application. So, too, is the process of seeking certiorari an equally significant extension of the proceedings on the original application. That this final stage in the state post-conviction proceedings occurs in a federal, not a state court, is immaterial to the *Saffold* analysis.

Thus, under *Saffold*, as long as the post-conviction review process is incomplete the application remains pending and the statute of limitations is tolled. The core consideration under *Saffold* is not the court in which review is to take place but the indeterminacy of judgment on the original application for relief while avenues for further review remain available. Certiorari review from state court denial of collateral relief plainly represents such an avenue.

The fact that certiorari is a discretionary writ rather than an appeal of right is insignificant, for that is equally true of petitions for discretionary review to state high courts, which also toll the limitations period. *Id.* at 220-21. Nor does the fact that state prisoners are not required to seek certiorari review prior to filing a habeas petition change the outcome. It is widely accepted that a prisoner's application for state post-conviction relief remains pending while he pursues other avenues of discretionary relief at the state level such as

motions for reconsideration or petitions for rehearing.[29] Certiorari review of post-conviction proceedings in this Court is no different. Finally, under the explicit logic of *Saffold*, whether a petition for certiorari is actually filed or not is immaterial to the application's pendency. In either case, the state court's judgment is subject to potential review by this Court.

B. Tolling The Statute Of Limitations Under § 2244(d)(2) Pending Certiorari Review Is Consistent With AEDPA's Statutory Scheme.

The statutory context of § 2244(d)(2), like its plain meaning, supports tolling of the statute of limitations pending certiorari review. First and foremost, the "trigger" provision, and the tolling provisions specified in § 2244(d)(2), are corresponding parts of AEDPA's statute of limitations scheme; essentially, they constitute a rule and its exception. In *Clay*, 537 U.S. at 527, the Court held that a federal conviction is not "final" until the time to petition for certiorari has expired, and thus strongly suggested that no state court conviction is final under § 2244(d)(1)(A) until the time for filing for certiorari has expired or the petition has been acted upon by the Court. 28 U.S.C. § 2244(d)(1)(A) (specifying in relevant part that the one-year AEDPA limitations period commences on the date judgment becomes "final"). Because of this integral relationship between § 2244(d)(1)(A) and (d)(2), the meaning of "pending" under § 2244(d)(2) should be congruent with the Court's interpretation of "finality" under § 2244(d)(1)(A). In the contexts of review of a state court criminal conviction on direct review and on post-conviction review, the Court's role, function, and jurisdiction are the same; namely to finally determine any appropriate questions of federal law that arise. Accordingly, an

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[29] *See, e.g., Nyland* v. *Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (per curiam); *Crawley* v. *Catoe*, 257 F.3d 395, 398 (4th Cir. 2001); *Serrano* v. *Williams*, 383 F.3d 1181 (10th Cir. 2004).

interpretation that harmonizes the two provisions by recognizing that no final state court judgment is complete until the time for filing a petition for certiorari has expired or until the court has acted on a petition simply recognizes the identical nature of this Court's role in each context.

As a procedural matter, this Court treats certiorari petitions seeking review of state court judgments as though they stem from decisions rendered by lower federal courts and are thus part of the ordinary appellate process. The Court's review of a judgment from a state's highest court is "conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States." *Id.* § 2104. On certiorari review, this Court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Id.* § 2106. The ultimate effect of this Court's exercise of its authority to review an underlying state court judgment does not depend in any way upon its posture below. Direct appeals from state convictions and state post-conviction proceedings alike cannot be considered final as long as they remain subject to the Court's modification, vacatur, or remand on certiorari review.

Moreover, a close examination of the legislative history of § 2244(d)(1)(A) reveals that Congress had reasons for settling on the wording of the provision that are completely unrelated to any distinction between certiorari review of direct and collateral state proceedings. See *Kapral* v. *United States*, 166 F.3d 565, 577-78 (3d Cir. 1999) (Alito J., concurring). The evolution of § 2244(d)(1)(A) instead represented a congressional effort to divorce the trigger provision from exhaustion requirements.

The proposed initial trigger for the running of the statute of limitations under § 2244(d)(1)(A) was "the date on which state remedies are exhausted." S. 3, 104th Cong. § 508 (1995). Shortly after Senator Dole introduced Senate Bill 3, Senators Specter and Hatch sponsored S. 623, 104th Cong. § 2 (1995), which apparently marks the genesis of the language now codified in § 2244(d)(1)(A). Rather than hinging the trigger provision on the exhaustion requirement, Senate Bill 623 provides that the limitations period commences on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Senator Specter's introductory remarks make clear that the purpose of the change was to abandon "exhaustion" as the triggering event for the limitations period because the exhaustion trigger facilitated "endless delays" in federal habeas cases. See 141 Cong. Rec. S4592 (daily ed. Mar. 24, 1995). See also *Kapral*, 166 F.3d at 580-81 ("[T]he phrase 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review' seems to have been employed to make it clear that the approach taken in S.3 and prior bills was being changed.") (Alito, J., concurring).

This history renders inescapable two important conclusions. The first is that the specific language Congress ultimately enacted in § 2244(d)(1)(A) was chosen for reasons unrelated to the Supreme Court's role in reviewing direct and collateral proceedings. Second, given Congress' clear intent to unmoor the limitations provisions from exhaustion requirements, the fact that certiorari review is not required for exhaustion is simply irrelevant to the meaning of § 2244(d)(2).

AEDPA's broader structure also demonstrates that where Congress intended to circumvent the certiorari process in this Court, it did so with unmistakable clarity. In 28 U.S.C. § 2261 *et seq.* Congress established special habeas corpus procedures for states that "opt in" by complying with, *inter*

alia, specific procedures related to the provision of competent counsel. Although not at issue here, the "opt-in" provisions contain limitations and tolling provisions that are markedly different from those of § 2244(d), a contrast the Court has already found telling in *Duncan* v. *Walker*, 533 U.S. 167, 177-78 (2001). The opt-in tolling provision, § 2263(b)(2), tolls a 180-day limitations period for filing a federal habeas petition "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court* disposition of such petition." 28 U.S.C. § 2263(b)(2) (emphasis added). Thus, while § 2244(d)(2) focuses on the nature of the underlying application as one for "State or other collateral review," under § 2263(b)(2), it is the nature of the court in which the application is being adjudicated that Congress explicitly makes dispositive. Rather than tolling the limitations period while an application for state collateral relief is pending in any court that might properly exercise jurisdiction (including this Court), § 2263(b)(2) expressly tolls it from the point of filing in state court until final disposition in state court.

The Court has observed frequently that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The language of § 2263(b)(2) demonstrates that Congress knew how to depart from the established meaning of finality to ensure that the certiorari process would not toll the limitations period. Thus, the proper inference to be drawn from the disparate formulations Congress used is that § 2263(b)(2) does not toll the statute of limitations for the certiorari stage of post-conviction proceedings while § 2244(d)(2) does. Such a difference in treatment, moreover, is fully consistent with the curtailed

nature of the opt-in limitations and tolling provisions as compared to their non-opt-in counterparts.

AEDPA's statutory structure and history make clear there can be no functional difference between finality under 28 U.S.C. § 2244(d)(1)(A) and pendency under 28 U.S.C. § 2244(d)(2). The Court should now alleviate the costly and unnecessary confusion engendered by the Eleventh Circuit's decision here and restore coherence to the legislative scheme by recognizing that a state court application for collateral relief remains pending under § 2244(d)(2) while a petition for certiorari may properly be filed or is under consideration in the same way that a direct appeal cannot be considered final under § 2244(d)(1)(A) until such a petition has been reviewed or the period for filing one has expired. See *Clay*, 537 U.S. at 528 n.3.

C. Tolling Preserves This Court's Institutional Role In Reviewing State Post-Conviction Proceedings.

Tolling the statute of limitations pending this Court's consideration of a petition for certiorari would also properly acknowledge and preserve the Court's unique historical and institutional role in protecting state prisoners from state decisions in violation of federal law or the United States Constitution, a role that differs markedly from that played by any other federal court in adjudicating habeas claims. Although state prisoners would not be precluded legally from filing petitions for certiorari from state court denial of collateral relief by a failure to toll the statute of limitations during that period, the natural effect of such a disposition would be to severely limit or effectively eliminate their right to do so while they expend limited time and resources in preparation of federal habeas petitions. See *Durham* v. *United States*, 401 U.S. 481, 483 (1971) (indicating that Congress has given a right to petition for certiorari), *overruled on other grounds by Dove* v. *United States*, 423 U.S. 325 (1976). If this Court holds that such tolling is

inappropriate, state prisoners may well conclude that the risk of forfeiting their habeas claim is simply too great.

This Court's power and authority to review criminal cases arising from state courts has been firmly established for nearly two centuries. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In fact, the Court's authority in this realm significantly predates the availability of federal habeas corpus relief to state prisoners, beginning only in 1867. See *Fay* v. *Noia*, 372 U.S. 391, 415 (1963) (citing Judiciary Act of February 5, 1867, ch. 28, 61, 14 Stat. 385, 385-86), *abrogated on other grounds by Coleman* v. *Thompson*, 501 U.S. 722, 744-51 (1991). This expansive scope is highlighted by the broad language of 28 U.S.C. § 1257(a), which provides for Supreme Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of . . . the United States."

Tolling the statute of limitations during the pendency of a petition for certiorari from the denial of state post-conviction relief would allow the Supreme Court to reach and resolve some important federal questions free of the complications that would encumber them and bedevil the lower federal courts if prisoners were effectively required to litigate them solely in a federal habeas forum. The opportunity for Supreme Court review may be especially important, for instance, when state post-conviction courts choose to decide the merits of federal constitutional contentions that, in federal habeas corpus proceedings, would be barred or clouded by difficult applications of procedural doctrines peculiar to federal habeas practice, such as the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989). See *Beard* v. *Banks*, 542 U.S. 406, 411-12 (2004) (recognizing that *Teague* may bar federal habeas adjudication of claims that state post-conviction courts elect to entertain); and see, *e.g.*, *Durden* v. *California*, 531 U.S.

1184, 1184 (2001) (Souter, J., dissenting from the denial of certiorari).

Discouraging meritorious petitions for certiorari from state court denial of collateral relief also risks stifling the development of the law in areas where allegations of constitutional violations often cannot be raised on direct review, characteristic examples being *Brady* violations or most ineffective assistance of counsel claims. Review at this stage is especially valuable when the federal question addresses the manner in which state post-conviction proceedings should be conducted or where a valid constitutional claim is raised for the first time at the state post-conviction stage. See *McNeal* v. *Culver*, 365 U.S. 109, 116 (1961) (holding that petitioner was entitled to a hearing on his state habeas corpus claim); *Wilde* v. *Wyoming*, 362 U.S. 607 (1960) (concluding that a state trial court had not held a necessary hearing to determine a federal claim advanced in a petition for state post-conviction relief); *Smith* v. *Texas*, 543 U.S. 37, 48 (2004) (holding on review of state post-conviction proceedings that a "nullification instruction" directing a capital sentencing jury to give effect to mitigating evidence only if the jury answered "no" to at least one of two questions relating to deliberateness and future dangerousness was inadequate under the Eighth Amendment).

Decisions in federal habeas cases also cannot develop or clarify the scope of substantive constitutional protections. Strict statutory and doctrinal standards circumscribe the range of issues that may be litigated in federal habeas corpus proceedings. Under AEDPA, federal habeas relief is only available in the limited circumstance when the state court decision is "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); see also *Williams* v. *Taylor*, 529 U.S. 362, 405-07 (2000). A rule that discourages consideration of petitions for certiorari from state court denial of post-conviction relief will

necessarily limit this Court's opportunities to clarify or articulate with precision the contours of any federal constitutional rules because the "reasonableness" buffer mandated by § 2254(d) precludes adjudication on the merits of any constitutional issue that the state courts decided incorrectly but not so incorrectly as to be beyond the range of reasonable mistake.

D. Tolling The Statute Of Limitations Under § 2244(d)(2) Pending Certiorari Review Avoids Absurd And Inequitable Results.

The language of § 2244(d)(2) should be interpreted to avoid absurd results. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Yet the Eleventh Circuit's rule would yield just such results when this Court overturns a state court judgment rendered in state post-conviction proceedings and remands the matter to state court for action consistent with the Court's opinion.[10] Under the Eleventh Circuit rule, the Supreme Court stage would inexplicably be excluded from the application's pendency, and the AEDPA limitations period would continue to run, notwithstanding the fact that the basis for the Court's disposition must be the state court's judgment on the underlying application for state post-conviction relief. Yet upon remand for further state proceedings, under the Eleventh Circuit's logic, the application would suddenly once again be "pending" and the statute of limitations would again be tolled, though very likely for an already expired limitations period.

It is precisely such a counterintuitive definition of pendency through fits and starts that this Court rejected in *Saffold*. Excision of the period for seeking Supreme Court review from the natural progression of the application up the chain of review then back down through remand is plainly artificial. Indeed, in an attempt to rationalize the scheme, one federal

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[10] *See, e.g., Bunkley* v. *Florida*, 538 U.S. 835, 842 (2003); *Ozmint* v. *Nance*, 543 U.S. 1043 (2005); 28 U.S.C. § 2106.

district court confronted with a scenario in which a petition for certiorari was granted by this Court, the state court judgment vacated, and the case remanded for further state proceedings, held that the statute of limitations must be considered *retroactively* tolled under § 2244(d)(2) for the entire period the case was pending before the Court. See *Coleman* v. *Davis*, 175 F. Supp. 2d 1109, 1111 (N.D. Ind. 2001). Such a rule, in conditioning the tolling effect of § 2244(d)(2) on the Supreme Court's actual disposition of the case, offers no predictability for state prisoners trying diligently to preserve their federal rights. Even if retroactive tolling were to become the rule for cases in which the Court reverses and remands, it would not be available to those petitioners whose underlying convictions were affirmed.

The state prisoner's only recourse to preserve his federal habeas claim in such a case would be to file a habeas corpus petition even while the Supreme Court actually reviews his state post-conviction application on the merits.[31] While federal district courts might stay habeas proceedings pending this Court's review, this would achieve a result no different than tolling would have done, save for needless expense, confusion, and inefficiency.

Respondent's rule thus forces state prisoners striving diligently to preserve their federal claims to file "protective" and unripe federal habeas claims concurrently with or subsequent to their certiorari petitions, resulting in the

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[31] Numerous habeas petitions have already been dismissed as time-barred when petitioners counted on tolling while they pursued or were entitled to pursue certiorari review of state court denial of post-conviction relief. *See, e.g.*, *Miller* v. *Dragovich*, 311 F.3d 574, 580 (3d Cir. 2002); *White* v. *Klitzkie*, 281 F.3d 920, 924-25 (9th Cir. 2002); *Crawley*, 257 F.3d at 399; *Snow* v. *Ault*, 238 F.3d 1033 (8th Cir. 2001); *Stokes* v. *District Attorney*, 247 F.3d 539 (3d Cir. 2001); *Coates*, 211 F.3d 1225; *Isham* v. *Randle*, 226 F.3d. 691 (6th Cir. 2000), *overruled en banc by Abela*, 348 F.3d 164; *Steed* v. *Head*, 219 F.3d 1287 (11th Cir. 2000); *Orr* v. *Johnson*, 192 F.3d 510 (5th Cir. 1999); *Rhine*, 182 F.3d at 1156.

irrational and inefficient piecemeal litigation that Congress sought to avoid. *Duncan*, 533 U.S. at 180 (declining to interpret § 2244(d)(2) in a way that creates more opportunities for delay and piecemeal litigation). And even these haphazard and absurd results would occur only when pro se prisoners or counsel can avoid the Eleventh Circuit's procedural trap for the unwary; namely the intuitive impression that the potential for review of the post-conviction proceedings continues during the certiorari phase, while in reality the time to file a federal habeas petition is running out.

The Eleventh Circuit's rule would thus lead to a messy procedural landscape as well as inequitable results. Under the guise of promoting comity and federalism, the rule contributes to needless friction between the state courts' interest in full and fair post-conviction proceedings and the federal interest in ensuring that habeas claims are ripe and scrupulously prepared. The time period between the date the criminal conviction becomes final (through and including expiration of the time for filing a petition for certiorari) and the initial application for state post-conviction relief counts against AEDPA's one-year limitations period. *Painter* v. *Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001); *Curtiss* v. *Mount Pleasant Corr. Facility*, 338 F.3d 851, 856 (8th Cir. 2003). For any number of reasons, most typically the time required for critical new facts to come to light and the state habeas claim to be investigated properly, this time period is often very substantial in capital cases (see *supra*, at 5-11). Here it was 364 days.

It would be a mistake to imagine that the course of state post-conviction proceedings might allow a state prisoner any opportunity to begin to craft a federal habeas petition. The reality is that a litigant can only begin to formulate a germane federal petition after the state post-conviction evidentiary hearing and the judge's disposition. Thus, in the course of investigating and preparing an application for *state* collateral relief, a state prisoner through no fault of his own may

already have used the better part or nearly all of his one-year limitations period for filing a *federal* habeas petition. Tolling the statute during the pendency of a certiorari petition would help alleviate the systemic strain of a zero-sum procedure that forces state prisoners to rush through their investigation and preparation of state post-conviction relief applications, thereby depriving state courts of a full and fair opportunity to pass meaningfully on their federal as well as state claims.

Moreover, it is not only state prisoners who have a vital interest in the availability of certiorari review from state post-conviction proceedings. State officials as well may seek review from the Supreme Court at this stage in order to clarify issues of federal law. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987) (holding that the state Superior Court improperly extended *Anders* procedures to state post-conviction proceedings); *Florida* v. *Nixon*, 543 U.S. 175, 188-89 (2004) (holding on certiorari review of post-conviction proceedings that counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient). While AEDPA's ticking clock may well force state prisoners to skip the certiorari stage in order to prepare and timely file an initial federal habeas petition, the State suffers from no such dilemma. Because certiorari review in this Court represents the only channel available to the State if the prisoner prevails in state post-conviction proceedings, this Court might then be faced with the anomalous situation of reviewing certiorari petitions from state collateral proceedings when the State loses but rarely when the State wins.

Furthermore, unfairness could result if a state prisoner who wins in the highest state court and has his conviction overturned and sentence vacated is later time-barred under AEDPA because the State petitioned for and obtained certiorari review in this Court. In such a case, a state prisoner would not even have a basis for filing a protective habeas

petition because his underlying conviction and sentence would have been vacated. Thus, failure to toll the statute of limitations could unfairly preclude a state prisoner from filing a timely habeas petition based only on the vagaries of procedural matters entirely outside his control, such as, for example, whether a state court chooses to stay or vacate a judgment for the prisoner at the highest state court level pending this Court's certiorari review. Only a uniform interpretation that synchronizes finality under § 2244(d)(1)(A) with pendency under § 2244(d)(2) would properly take into account the identical nature of this Court's role in both contexts, ensure the smooth progress of state collateral relief proceedings to final resolution, and enable state prisoners who seek to litigate federal claims meaningfully to conform their behavior to the law's commands.

II. EQUITABLE TOLLING IS WARRANTED.

If this Court concludes that filing for a writ of certiorari from state court denial of post-conviction relief does not toll the AEDPA statute of limitations, Mr. Lawrence should still be allowed to pursue federal habeas corpus relief because the facts of this case warrant equitable tolling. A litigant is entitled to equitable tolling of a statute of limitations when he shows that extraordinary circumstances beyond his control prevented the vindication of his rights and that he diligently pursued those rights. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). In this case, two conditions in Florida so severely impeded Mr. Lawrence's ability to file a timely federal habeas petition as to rise to the level of an extraordinary circumstance. First, extreme disorganization within Florida's capital defender program during a period of significant reform in the structure of that program caused 298 days to elapse before any appointed counsel began to act in Mr. Lawrence's case. This disarray proved so pervasive that the Supreme Court of Florida tolled the limitations period for state post-conviction proceedings in

Mr. Lawrence's case. Second, Mr. Lawrence's state-certified and appointed counsel conducted this case as though a petition for a writ of certiorari at the conclusion of state post-conviction proceedings would toll the AEDPA limitations period. This advice, erroneous under Eleventh Circuit precedent, coupled with the time lost to Florida's administrative delays prior to the start of post-conviction proceedings, prevented Mr. Lawrence from filing a timely federal habeas petition. Moreover, Mr. Lawrence satisfied the diligence requirement for equitable tolling by reasonably relying on the advice of automatically appointed counsel – counsel the state not only set out to ensure would be of high quality but also promised to monitor. His reliance was all the more reasonable given his severe cognitive limitations. Taken in sum, the facts in this case warrant equitable tolling of AEDPA's limitations period so as to allow Mr. Lawrence to pursue the merits of his federal habeas claim.

A. The Facts Of Mr. Lawrence's Case Meet The Established Standards For Equitable Tolling.

Courts evaluate claims for equitable tolling by examining the totality of the circumstances. *E.g.*, *Alvarez-Machain* v. *United States*, 107 F.3d 696, 701 (9th Cir. 1996). The precise elements of the equitable tolling doctrine have long been the subject of confusion and analytical imprecision. Courts and commentators alike have confused equitable tolling with equitable estoppel. The circuits that acknowledge the distinction between these doctrines, including the Eleventh Circuit, note that tolling, unlike estoppel, requires no showing of affirmative misconduct on the part of the opposing party.[32] *Browning* v. *AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997) ("[Defendant] appears to be confusing, as do many

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[32] To the extent that the Eleventh Circuit's opinion below suggested that such a showing was required, *see* (J.A.__) *Lawrence*, 421 F.3d at 1226, the court went against its own clearly established precedent in *Browning*.

litigants and courts, the doctrines of equitable tolling and equitable estoppel. Equitable estoppel does require an allegation of misconduct on the part of the party against whom it is made, but equitable tolling does not require any misconduct on the part of the defendant.").[33] Although equitable tolling is not appropriate in cases of "garden variety excusable neglect," *Irwin*, 498 U.S. at 96, it should be evaluated on a case-by-case basis and granted in the presence of a "unique, specific set of facts." *Browning*, 120 F.3d at 227.[34] The facts of this case clearly rise to this standard.

Additional interpretive principles support equitable tolling of AEDPA's statute of limitations in this case. First, Mr. Lawrence seeks federal review of a flawed capital conviction, and this Court has recognized repeatedly that capital cases warrant special scrutiny because "death is a different kind of punishment." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1976) (plurality).[35] Moreover, even in the non-capital context this

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[33] *See also Lehman* v. *United States*, 154 F.3d 1010, 1016 (9th Cir. 1998) ("Equitable tolling focuses primarily on *the plaintiff's* excusable ignorance of the limitations period. . . . Equitable estoppel focuses on the actions of *the defendant*."); *Bell* v. *Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996) (noting that unlike equitable estoppel, "equitable tolling does not require any misconduct on the part of the defendant"); *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit."), *abrogated on other grounds by Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997).

[34] *See also Harris* v. *Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (describing equitable tolling as "a discretionary doctrine that turns on the facts and circumstances of a particular case . . . [that] does not lend itself to bright-line rules" (quoting *Fisher* v. *Johnson*, 174 F.3d 710, 713 (5th Cir. 1999))).

[35] *See also Ring* v. *Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that '[d]eath is different.'" (citation omitted) (second alteration in original)); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)

Court has noted that the statute of limitations is to be interpreted fairly and in an even-handed fashion. See *Day* v. *McDonough*, 126 S. Ct. 1675 (2006). Procedural rules do not exist to "trap the unwary pro se prisoner." *Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982)). Finally, this Court has long held that the doctrine of equitable tolling rests upon the maxim that one may not, as Florida now attempts to do, "take advantage of his own wrong" and that this is a principle "[d]eeply rooted in our jurisprudence . . . and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959). Given the extraordinary circumstances in this case, this Court should exercise its equitable powers and toll the AEDPA limitations period to allow Mr. Lawrence to pursue his right to seek federal habeas relief.

B. Florida's Acknowledged Systemic Failures Impeded The Timely Filing Of Mr. Lawrence's Federal Habeas Petition.

This Court denied certiorari following Mr. Lawrence's direct appeal on January 20, 1998, in the midst of a period of tremendous upheaval in Florida's post-conviction system. There was significant administrative confusion surrounding the split of the single office representing all indigent capital defendants on collateral review into three Capital Collateral Regional Counsel (CCRC) offices. From the time they were created, these offices were critically underfunded and understaffed. Additionally, the state created a new document repository for maintaining records in capital post-conviction proceedings. The transition to this new, complex system created substantial delays in accessing documents. Finally, although the state had promised automatically to appoint counsel in all post-conviction proceedings, it lacked a

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("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

sufficient number of private attorneys to supplement its capital public defender program. See generally, *Amendments to Florida Rules of Criminal Procedure*, 719 So. 2d 869.

In June 1998, the Supreme Court of Florida recognized that the state's ongoing failures and their virtually certain consequences would make it practically impossible to comply with the statute of limitations. As such, the court issued a tolling order, and specifically listed Mr. Lawrence among those for whom the state's limitations period for post-conviction review would be tolled during this particular time of upheaval. *Id.* app. B. The Supreme Court of Florida, however, was without authority to toll Mr. Lawrence's concurrent AEDPA limitations period. Therefore, his time for filing for federal habeas relief continued to run even while the Supreme Court of Florida's order tolled the limitations period for filing his motion for state post-conviction relief.

Mr. Lawrence was ultimately ensnared in the very trap that led the Supreme Court of Florida to toll his state statute of limitations. Mr. Lawrence should have automatically been appointed counsel within thirty days of January 20, 1998, when this Court issued its denial of certiorari following direct appeal and his sentence became final. See Criminal Justice Comm., *Senate Staff Analysis and Economic Impact Statement of CS/SB 1328*, at 4 (Fla. Mar. 3, 1998) (stating that "the time limitations for filing a 3.850 [motion to initiate post-conviction review] are established with the understanding that the defendant will have counsel assigned and available to begin addressing the defendant's post-conviction issues within thirty days after the judgment and sentence are final.").[36] However, for no other reason than the

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[36] *See also* Fla. R. Crim. P. 3.851 cmt. (1993) (stating that "[C]ounsel should be designated . . . not later than 30 days after the defendant's judgment and sentence of death becomes final . . . . In the event the capital collateral representative is not fully funded and available to provide proper representation . . . the reduction in the time period would not be justified and would necessarily have to be repealed.").

State's own failures, Mr. Lawrence did not receive adequate counsel for 298 days. The administrative chaos that resulted from the transition to the underfunded CCRC offices and the refusals of two appointed attorneys to take the case consumed the vast majority of his state and AEDPA limitations period.

The State's failures already constrained Mr. Lawrence's ability to file an adequate petition. The State's transition to the new document repository system exacerbated the consequences of this needless delay. State-appointed counsel lacked access to the complete record in this case until December 14, 1998 – 337 days after Mr. Lawrence's conviction became final and 92% of the limitations period had elapsed. This left counsel with a wholly inadequate time period in which to investigate and address complex issues involving the performance of Mr. Lawrence's trial counsel, as well as draft the petition itself. Counsel ultimately filed a rushed state post-conviction motion on January 19th, 1999 – with one day left on the one-year AEDPA statute of limitations.[37]

Given that 364 days had expired before assigned counsel filed for state post-conviction relief, the timely filing of Mr. Lawrence's federal habeas petition was practically impossible. Mr. Lawrence was required to exhaust state remedies before he would be eligible for federal habeas relief. While his state post-conviction proceedings were ongoing, it was legally impossible for him to file a federal habeas petition and functionally impossible to prepare it. The Supreme Court of Florida issued the final denial of state post-conviction relief on November 18, 2002. Under the Eleventh Circuit's interpretation of AEDPA, the only day Mr. Lawrence could have filed his federal habeas petition was November 19,

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[37] Clearly dissatisfied with this initial motion for state post-conviction relief, counsel filed an amended petition on April 22, 1999. *See* Am. Mot. for Post-Conviction Relief 3.850, *State* v. *Lawrence*, No. 94-397-CF (Santa Rosa County, Fla. Cir. Ct. Apr. 22, 1999).

2002. For a pro se federal habeas petitioner, such precision is unmanageable.

More compelling circumstances for equitable tolling would be difficult to imagine. The highest court in the state of Florida has already decided that the State's failures were so egregious that Mr. Lawrence could not possibly be expected to meet the requirement of a one-year statute of limitations and tolled the state statute. Of course, the Supreme Court of Florida did not have the authority to toll the AEDPA limitations period concurrently with the state statute even though it was equally impossible for Mr. Lawrence to meet the one-year federal limitations period. The Supreme Court of Florida tolled the state statute for 122 days. Ultimately, Mr. Lawrence's petition for federal habeas relief was only 112 days late. The same compelling circumstances warrant the same relief from AEDPA's statute of limitations – relief that would enable Mr. Lawrence to file a timely federal habeas petition.

C. Mr. Lawrence's Reasonable Reliance On His State-Appointed And Monitored Counsel Prevented Him From Filing A Timely Federal Habeas Petition.

The extraordinary delays caused by Florida's institutional failures left Mr. Lawrence with a razor-thin margin of error. The erroneous advice of his post-conviction counsel eliminated that margin and ultimately prevented him from filing a timely federal habeas petition. Under controlling Eleventh Circuit precedent, Mr. Lawrence's AEDPA statute of limitations expired one day after final state court denial of post-conviction relief. His counsel, however, conducted Mr. Lawrence's case as though he had one day from the time this Court denied certiorari from his post-conviction proceedings. With one day remaining on his AEDPA clock, Mr. Lawrence's right to federal habeas relief was already in jeopardy; his counsel's error proved fatal to his petition.

Mr. Lawrence had every reason to expect that Florida would fulfill its promise of high quality representation. Most notably, in 1999, Florida took the important step of creating an affirmative obligation for the state courts to monitor counsel. Fla. Stat. § 27.11(12) reads:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Although the American Bar Association has recommended such monitoring, Florida still stands as the only state to expressly require it. See Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Post-conviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521, 526, 565 (2005). Yet Florida did not keep this promise of vigilance to Mr. Lawrence.

Florida also promised that the counsel it provided in capital post-conviction proceedings would meet minimum requirements of experience and competence by establishing a registry of private attorneys. Fla. Stat. § 27.710. The state legislature required that any attorney appointed in such proceedings would demonstrate experience in the practice of criminal law, both through the amount of time in practice and the number of cases tried. Specifically, the State required that attorneys in the registry have at least three years of experience in the practice of criminal law, and that they have participated

in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings. *Id.* § 27.704(2). In so doing, the state promised its indigent capital defendants competence and experience from their counsel.

The Florida state legislature placed limitations on counsel's workload in an effort to further ensure the quality of its registry counsel. Section 27.711(9) provides that an attorney may not represent more than five defendants in capital post-conviction litigation at any time. By restricting the case load of all registry counsel in this way, the Florida legislature sought to guarantee that qualified counsel would have a sufficient amount of time to dedicate to each client and thus would continue to represent inmates in a timely and proficient manner.

Given these minimum qualifications and more importantly the promise of the courts to supervise the automatically appointed counsel, a petitioner had every reason to have faith in the system. This Court established in *Pace* that a petitioner must exercise due diligence in order to invoke equitable tolling, but did not clearly define the specific criteria for such a showing. *Pace* v. *DiGuglielmo*, 544 U.S. 408, 419 (2005). This Court's other precedents, however, provide guidance. A habeas petitioner seeking equitable tolling does not act with due diligence if: (1) the record contains facts which would have put a reasonable litigant on notice that his attorney would not abide by AEDPA's filing deadline, *Williams* v. *Taylor*, 529 U.S. 420, 442 (2000) (examining due diligence in the context of whether a petitioner's failure to develop a factual record in state court precludes a fact hearing in federal court); or (2) if the "petitioner engaged in intentionally dilatory litigation tactics." *Rhines* v. *Weber*, 544 U.S. 269, 278 (2005) (setting forth test for determining whether a petition may be stayed so that petitioner may return to state court to exhaust federal claims in state court). The present record contains no evidence that Mr. Lawrence engaged in dilatory tactics or ignored any indications in the record that

his registry counsel offered incorrect advice as to the federal habeas filing deadline.

On the facts of this case, greater diligence cannot be expected. No petitioner should be required to second guess his or her counsel in order to demonstrate diligence.[38] Certainly this petitioner had ample reason for complete confidence in his registry counsel, who explained AEDPA's tolling provision with conviction and certainty and acted accordingly. At every step, Florida encouraged Mr. Lawrence to rely upon his attorney's interpretation of the AEDPA statute of limitations. Yet, as a result of Mr. Lawrence's good faith and reasonable reliance, he inadvertently forfeited a longstanding federal right.

The State correctly noted in the Eleventh Circuit that a lawyer's mistake is typically not a sufficient basis for equitable tolling. See *Irwin*, 498 U.S. at 96; *Rouse* v. *Lee*, 339 F.3d 238, 248-49 (4th Cir. 2003). Yet the State's own attorneys made a similar mistake when interpreting AEDPA's statute of limitations in the face of the same circuit split that confronted Mr. Lawrence. See *Day*, 126 S. Ct. at 1679.

In addition, courts have shown a particular willingness to toll the statute when faced with questions about the mental competency of those involved in the attorney-client relationship. See *Cantrell* v. *Knoxville Cmty. Dev. Corp.*, 60

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[38] *See Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."); *Rhines*, 544 U.S. at 279 (Souter, J., concurring) (noting that "*pro se* petitioners (as most habeas petitioners are) do not come well trained to address" such "trick[y]" habeas matters as exhaustion). Because of the procedural default and exhaustion doctrines applicable to federal habeas review, thorough knowledge of both capital and federal habeas jurisprudence is essential. *See generally ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, No. 10.15.1 & cmt. (2003).

F.3d 1177, 1180 (6th Cir. 1995); *Calderon* v. *United States Dist. Court*, 163 F.3d 530, 541-42 (9th Cir. 1998) (en banc), *abrogated on other grounds by Woodford* v. *Garceau*, 538 U.S. 202 (2003).[39] Significant questions about Mr. Lawrence's mental competency are present here. He has been found to have a full scale IQ of 81, which is the lowest part of the low average range. This IQ places Mr. Lawrence near the level of legal incompetence[40] and correlates with an inability to process ideas, to plan, to understand, to appreciate relationships, and to understand what goes on in daily life.[41] Other measures of his intellect do not rise even to that level,

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[39] This view is consistent with a general recognition of the need to protect the incompetent from the potential harshness of statutes of limitations that dates back to the foundations of English and American limitations law. *See* Limitations Act, 1623, 21 Jac. 1, c. 16 (Eng.) (exempting persons of *non compos mentis*); *cf. Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879) (noting that Limitations Act was adopted in most American colonies before Revolution); *see also Black's Law Dictionary* 1074 (7th ed. 2003) (defining "non compos mentis" as "1. Insane. 2. Incompetent."). And, as this Court long ago recognized in considering claims for equitable relief from an expired statute of limitations, "greater consideration and care are due to persons known to be unable to take care of themselves than to those who are fully able to do so." *Graffam* v. *Burgess*, 117 U.S. 180, 185 (1886) (granting relief from statute of limitations for woman who had retained counsel to protect her interests).

[40] The American Association on Mental Retardation defines mental retardation as: (1) subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 to 75 or below) existing concurrently with (2) related limitations in adaptive functioning; and (3) onset before the age of eighteen. Am. Ass'n on Mental Retardation, *Definition of Mental Retardation*, *available at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last updated Mar. 11, 2005). "Psychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded." *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004).

[41] Penalty Phase Tr. at 78-79 (testimony of Dr. Glenn Galloway).

as he reads at the level of an eleven-year-old, has the writing skills of a nine-year-old, and left school in the seventh grade.

Mr. Lawrence's intellectual limitations heightened the impact of his attorney's error. While low intellect alone does not warrant the equitable tolling of the statute of limitations,[42] here Mr. Lawrence's severe cognitive deficiencies left him utterly incapable of safeguarding his legal rights. Furthermore, even if petitioner had the mental acuity to question his attorney's assurances regarding the proper time for filing his habeas petition, the existence of a circuit split on a central issue in this case reveals the complexity of the legal questions presented to Mr. Lawrence and his counsel. Compare *Abela*, 348 F.3d at 165-166, with *Coates*, 211 F.3d at 1227. Petitioner was in no position to effectively question his counsel's unequivocal statement as to the meaning of the law on a point of such ambiguity and complexity.

As a result, he now faces a sentence of death without any federal court review of the merits of his underlying claims. The initial delays and subsequent errors in Mr. Lawrence's representation are hardly "a garden variety claim of excusable neglect" by an attorney, see *Irwin*, 498 U.S. at 96. Florida's Registry Counsel system repeatedly failed Mr. Lawrence, even while it induced reliance given its affirmative protections. Given Mr. Lawrence's mental deficiencies, he reasonably relied on Florida's promises and the advice of his state-appointed counsel. He therefore plainly satisfied the diligence requirement for equitable tolling. His diligence, taken in concert with the extraordinary circumstances that prevented the timely filing of his federal habeas petition, warrants granting equitable tolling of his AEDPA statute of limitations.

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[42] *See Bilbrey* v. *Douglas*, 124 Fed. Appx. 971, 973 (6th Cir. 2005) (dismissing lower court decision to allow equitable tolling because the plaintiff "failed to establish a causal connection between her mental condition and her ability to file a timely petition.").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

- Mary Catherine Bonner /pck

JEFFREY T. GREEN
COURTNEY A. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MARY CATHERINE BONNER*
WANDA RAIFORD
MARY CATHERINE BONNER, PA
207 S.W. 12th Court
Ft. Lauderdale, Florida 33315
(954) 523-6225

Counsel for Petitioner

June 26, 2006

* Counsel of Record

ADDENDUM

STATUTORY ADDENDUM

28 U.S.C. § 2244. Finality of determination

* * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * * *

28 U.S.C. § 2254. State custody; remedies in Federal courts

* * * *

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * * *

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section,

and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

28 U.S.C. § 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court

affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

Fl. Stat. § 27.704. Appointment of assistants and other staff

Each capital collateral regional counsel may:

(1) Appoint, employ, and establish, in such numbers as he or she determines, full-time or part-time assistant counsel, investigators, and other clerical and support personnel who shall be paid from funds appropriated for that purpose. A full-time assistant capital collateral counsel must be a member in good standing of The Florida Bar, with not less than 3 years' experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, or five capital

postconviction evidentiary hearings or any combination of at least five of such proceedings. Law school graduates who do not have the qualifications of a full-time assistant capital collateral counsel may be employed as members of the legal staff but may not be designated as sole counsel for any person.

(2) Contract with private counsel who are members in good standing of The Florida Bar or with public defenders for the purpose of providing prompt and cost-effective representation for individuals who are sentenced to death in this state. A private counsel or public defender under contract with the regional counsel must have at least 3 years' experience in the practice of criminal law, and, prior to the contract, must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings.

(3) Appoint pro bono assistant counsel, who must be members in good standing of The Florida Bar, and who shall serve without compensation at the discretion of the capital collateral regional counsel.

Fl. Stat. § 27.710. Registry of attorneys applying to represent persons in postconviction capital collateral proceedings; certification of minimum requirements; appointment by trial court

(1) The executive director of the Commission on Capital Cases shall compile and maintain a statewide registry of attorneys in private practice who have certified that they meet the minimum requirements of s. 27.704(2), who are available for appointment by the court under this section to represent persons convicted and sentenced to death in this state in postconviction collateral proceedings, and who have attended within the last year a continuing legal education program of at least 10 hours' duration devoted specifically to the defense of

capital cases, if available. Continuing legal education programs meeting the requirements of this rule offered by The Florida Bar or another recognized provider and approved for continuing legal education credit by The Florida Bar shall satisfy this requirement. The failure to comply with this requirement may be cause for removal from the list until the requirement is fulfilled. To ensure that sufficient attorneys are available for appointment by the court, when the number of attorneys on the registry falls below 50, the executive director shall notify the chief judge of each circuit by letter and request the chief judge to promptly submit the names of at least three private attorneys who regularly practice criminal law in that circuit and who appear to meet the minimum requirements to represent persons in postconviction capital collateral proceedings. The executive director shall send an application to each attorney identified by the chief judge so that the attorney may register for appointment as counsel in postconviction capital collateral proceedings. As necessary, the executive director may also advertise in legal publications and other appropriate media for qualified attorneys interested in registering for appointment as counsel in postconviction capital collateral proceedings. Not later than September 1 of each year, and as necessary thereafter, the executive director shall provide to the Chief Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of its registry of attorneys who are available for appointment as counsel in postconviction capital collateral proceedings. The registry must be indexed by judicial circuit and must contain the requisite information submitted by the applicants in accordance with this section.

(2) To be eligible for court appointment as counsel in postconviction capital collateral proceedings, an attorney must certify on an application provided by the executive director that he or she satisfies the minimum requirements for private counsel set forth in s. 27.704(2).

(3) An attorney who applies for registration and court appointment as counsel in postconviction capital collateral proceedings must certify that he or she is counsel of record in not more than four such proceedings and, if appointed to represent a person in postconviction capital collateral proceedings, shall continue such representation under the terms and conditions set forth in s. 27.711 until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court. The court may not permit an attorney to withdraw from representation without a finding of sufficient good cause. The court may impose appropriate sanctions if it finds that an attorney has shown bad faith with respect to continuing to represent a defendant in a postconviction capital collateral proceeding. This section does not preclude the court from reassigning a case to a capital collateral regional counsel following discontinuation of representation if a conflict of interest no longer exists with respect to the case.

(4) Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If the appointed attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the Commission on Capital Cases shall notify the trial court. The Chief Financial Officer shall develop the form of the contract, function as contract manager, and enforce performance of the terms and conditions of the contract. By signing such contract, the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.

(5)(a) Upon the motion of the capital collateral regional counsel to withdraw pursuant to s. 924.056(1)(a); or

(b) Upon notification by the state attorney or the Attorney General that:

1. Thirty days have elapsed since appointment of the capital collateral regional counsel and no entry of appearance has been filed pursuant to s. 924.056; or

2. A person under sentence of death who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding, the executive director shall immediately notify the trial court that imposed the sentence of death that the court must immediately appoint an attorney, selected from the current registry, to represent such person in collateral actions challenging the legality of the judgment and sentence in the appropriate state and federal courts. The court shall have the authority to strike a notice of appearance filed by a Capital Collateral Regional Counsel, if the court finds the notice was not filed in good faith and may so notify the executive director that the client is no longer represented by the Office of Capital Collateral Regional Counsel. In making an assignment, the court shall give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death. The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death.

(6) More than one attorney may not be appointed and compensated at any one time under s. 27.711 to represent a person in postconviction capital collateral proceedings. However, an attorney appointed under this section may designate another attorney to assist him or her if the designated attorney meets the qualifications of this section.

Fl. Stat. § 27.711. Terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings

* * * *

(8) By accepting court appointment under s. 27.710 to represent a capital defendant, the attorney agrees to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced, or carried out, and the attorney is permitted to withdraw from such representation by a court of competent jurisdiction. However, if an attorney is permitted to withdraw or is otherwise removed from representation prior to full performance of the duties specified in this section, the trial court shall approve payment of fees and costs for work performed, which may not exceed the amounts specified in this section. An attorney who withdraws or is removed from representation shall deliver all files, notes, documents, and research to the successor attorney within 15 days after notice from the successor attorney. The successor attorney shall bear the cost of transmitting the files, notes, documents, and research.

(9) An attorney may not represent more than five defendants in capital postconviction litigation at any one time.

* * * *

(12) The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to

receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

* * * *

CERTIFICATE OF SERVICE

No. 05-8820

Gary Lawrence,

Petitioner,

v.

State of Florida,

Respondent.

I, Carter G. Phillips, do hereby certify that, on this twenty-sixth day of June, 2006, I caused a copy each of the Brief For The Petitioner and Joint Appendix in the foregoing case to be served by first class mail, postage prepaid, on the following party:

CHARLES J CRIST, JR.
ATTORNEY GENERAL
CASSANDRA K. DOLGIN
ASSISTANT ATTORNEY GENERAL
FLORIDA ATTORNEY GENERAL'S OFFICE
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579

Carter G. Phillips

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000